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**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

DEPT. OF TRANSPORTATION  
DOCKETS

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**In the Matter of the**

**CITIZENSHIP OF DHL AIRWAYS, INC.**

**Docket OST-2002-13089- 37**

**COMMENTS OF UNITED PARCEL SERVICE CO.**

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Dated: March 19, 2003

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**CITIZENSHIP OF DHL AIRWAYS, INC.**  
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**Docket OST-2002-13089**

**COMMENTS OF UNITED PARCEL SERVICE CO.**

United Parcel Service Co. (“UPS”) respectfully submits the following responsive to the Department of Transportation’s (the “DOT” or the “Department”) Notice Requesting Comments dated March 5, 2003.<sup>1</sup>

The DOT Inspector General has examined in an independent manner whether DHL Airways is under the “actual control” of U.S. citizens. In his report, he has revealed previously non-disclosed evidence which indicates that DHL Airways, under long-standing and consistent Department precedent, appears to be under the control of non-U.S. citizens. The Inspector General has therefore concluded that there are “a number of issues the Department should address within the formal docket proceeding.”<sup>2</sup> In reaching this conclusion, the Inspector General found that the process used by the Department to date “was not well-suited to this case.”<sup>3</sup>

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<sup>1</sup> See Notice Requesting Comments, Docket OST-2003-13089 (Mar. 5, 2003) (containing a redacted letter from the DOT Inspector General Ken Mead to The Honorable Don Young, Chairman of the House Transportation and Infrastructure Committee, dated March 4, 2003). An unredacted version of this letter was later released and is referred to hereinafter as the “*IG Report*.”

<sup>2</sup> *IG Report*, at 2.

<sup>3</sup> *IG Report*, at 5.

UPS urges that the Inspector General's conclusions and recommendations be afforded great deference by the Department, and that an oral evidentiary hearing be conducted to determine whether DHL Airways is controlled by foreign citizens and ultimately, the German postal monopoly, Deutsche Post.

**I. The *IG Report* Outlines Factors Which Indicate That DHL Airways May Be Under Foreign Control.**

1. The findings of the Inspector General raise doubt about DHL Airways' public assertion that is under the "actual control" of U.S. citizens. As the *IG Report* found, William A. Robinson is the "pivotal American figure in DHL Airways."<sup>4</sup> To this end, it is important for the Department to note the following significant discrepancy:

- In past pleadings before the DOT, DHL Airways has stated that 75% of its voting stock is held by Mr. Robinson, and that he is not now "or has he ever been an officer, director, or employee of any other company currently affiliated with Deutsche Post."<sup>5</sup>
- In apparent contradiction, the *IG Report* found that "DHL Worldwide Express, Inc. sold 55% of the equity and 75% of the voting stock in DHL Airways to Mr. Robinson, who was then a DHL Worldwide Express, Inc. director and major shareholder."<sup>6</sup>

In addition, the Department must pay special attention to the following apparent conflict:

- The ACMI contract between DHL Airways and DHL Holdings has provisions purported by DHL Airways to be "standard practice in the industry," including the ability by DHL Airways to market its services to others.<sup>7</sup>

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<sup>4</sup> *IG Report*, at 10.

<sup>5</sup> *See Consolidated Answer of DHL Airways*, Docket OST-2002-13089, at 6 & fn. 6 (Sept. 6, 2002) (emphasis added).

<sup>6</sup> *IG Report*, at 10 (emphasis added).

<sup>7</sup> *IG Report*, at 9.

- On the other hand, the Inspector General found that the ACMI agreement “provides that ‘the primary use’ of DHL Airways aircraft leased to DHL Holdings (USA) is to serve DHL Holdings (USA). Moreover, third-party business by DHL Airways using aircraft leased to DHL Holdings (USA) may not interfere with its obligations to the DHL network, and some profits resulting from third-party business on those aircraft are split equally between DHL Airways and DHL Holdings (USA). In turn, DHL Holdings (USA) reimburses DHL Airways for many of its operational costs for those aircraft which it leases, such as those associated with: leasing and financing of aircraft; cockpit crews and compensation for officers and employees; maintenance and repairs; taxes on property, gross receipts, and gross income; insurance; fuel; regulatory compliance; airport fees; over-fly permits; and fines.”<sup>8</sup>

2. Indeed, from the *IG Report*, it appears that DHL Airways may be in violation of a Department recommendation on what is necessary to maintain its citizenship. Apparently, when a letter was sent informing DHL Airways that it was a U.S. citizen, the DOT official may have done so with the requirement that DHL Airways obtain additional third-party business, as “DOT was concerned over DHL Airways’ reliance on this [DHL Holding’s ACMI] contract.”<sup>9</sup> Indeed, DHL Airways filed a statement with the Department on September 26, 2002, that it was not precluded from “seeking to expand its business with other customers.”<sup>10</sup> Yet, the Inspector General found that DHL Airways has “not materially increased third-party revenues.”<sup>11</sup> This raises the serious question whether the “recommendation” was, in fact, a legal requirement which has not been met.

3. The apparent conflict in these findings illustrates the need for an open, public proceeding. If DHL Airways is under the actual control of non-U.S. citizens, its certificate must

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<sup>8</sup> *IG Report*, at 8-9.

<sup>9</sup> *IG Report*, at 9.

<sup>10</sup> *Motion of DHL Airways and Surreply*, Docket OST-2002-13089, at 5, fn. 7 (Sep. 26, 2002).

<sup>11</sup> *IG Report*, at 9.

be revoked. If DHL Airways' citizenship is conditioned on meeting certain criteria, that must be put forth in a public order. Further, if the DOT believes DHL Airways is a U.S. citizen, it should issue a formal order stating so, but only after all parties have access to all information.

4. There are material issues of fact in dispute in this case. Indeed, there appear to be material issues of dispute between DHL Airways' public and private filings. As such, a transparent process in which all parties can meaningfully participate should be instituted by the Department. And, in this particular case, as discussed in section III, *infra*, that can only be accomplished by referring the matter to an Administrative Law Judge ("ALJ").

## **II. Deutsche Post, The Ultimate Corporate Parent In Control Of DHL Airways, Has A History Of Predatory Practices And Should Not Be Allowed To Conduct Business As A U.S. Domestic Carrier.**

5. A compelling reason for close public review is that the company which the evidence indicates is in ultimate control of the worldwide DHL enterprise, Deutsche Post, has a well-documented history of engaging in anti-competitive practices through the use of its first-class mail monopoly, and evading government regulations.

6. The European Commission ("EC" or "Commission") has documented Deutsche Post's record of engaging in practices that indicate a lack of regulatory compliance disposition. In particular, the Commission has documented Deutsche Post's use of corporate structural devices, including stock-purchasing in companies maintained by trusted intermediaries, to avoid disclosure of control over an entity that it finds necessary to its expansion into commercial markets. The Department should be aware of this behavior and of the extraordinary efforts that European governmental agencies have undertaken to ascertain the truth from Deutsche Post in proceedings involving its control of third parties.

7. As an example to aid the Department's understanding on this critical issue, we refer to the previously filed European Commission's "Decision of 14 December 1999"<sup>12</sup> which imposed heavy fines on Deutsche Post for supplying incorrect and misleading information in a required regulatory notification, and inaccurate information in response to requests for additional information. The importance of this EC Decision to the record in this proceeding becomes more significant in light of Deutsche Post's total control over DHL International Ltd. This EC Decision, coupled with Deutsche Post's active role in the management of DHL Airways through intermediaries as described in the *IG Report*, should be considered carefully by the Department.

8. The EC Decision details how Deutsche Post deliberately sought to hide its acquisition of a controlling interest in a German express carrier "Trans-o-Flex" by using third-party intermediaries under its own funding and control to acquire a majority of the shares of Trans-o-Flex. Only after the EC launched an *independent* investigation of Deutsche Post's misleading conduct was Deutsche Post compelled to reveal the documentation on the transactions, thus revealing its effective control of Trans-o-Flex. In its Decision, the EC stated:

The incorrect information was designed to deceive the Commission with regard to the acquisition of control, and thus to ensure that the Commission continued in its opinion that it was competent in the case, as had been suggested by the incorrect and misleading information in the Deutsche Post notification. Only after exhaustive investigation was the Commission able to clarify the facts sufficiently to be able to make a correct assessment of the acquisition of control in the event that it took a decision in the case.<sup>13</sup>

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<sup>12</sup> See Attachment to Amendment No. 2 to Petition of United Parcel Service Co., Docket OST-2002-13089 (Dec. 5, 2002) (containing Commission Decision of 14 December 1999 (2001/271/EC)).

<sup>13</sup> 1999 Commission Decision, para. 183 (emphasis added).

9. For this deliberately misleading conduct, the EC imposed the maximum monetary fines on Deutsche Post. The EC chose not to reduce the fines because “the gravity of the infringement” was “aggravated by the intention to deceive.”<sup>14</sup>

10. This past conduct is particularly relevant in light of the *IG Report* finding that the mandatory 75% American representation on DHL Airways’ Board of Directors comprises only Mr. Robinson and two personal/business consultants to him (the fourth and final board member being the CEO of DHL Airways.) A reading of the above EC Decision will reveal that this finding, if true, has a familiar ring to it in light of the findings and types of control techniques using “friendly” third parties discovered and revealed by the EC, but only after the Commission conducted an independent investigation into the matter.<sup>15</sup>

11. Additional anti-competitive practices of Deutsche Post are detailed in two additional rulings by the EC Competition authorities, one in March 2001, and the other in June 2002. Summaries of both of these cases have been previously filed to the Department.<sup>16</sup> In short, the EC has found that Deutsche Post has used public money to engage in anti-competitive behavior to push private-sector rivals out of the market. As a result, Deutsche Post has been forced to repay European government entities millions of euros for its abuse of a dominant

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<sup>14</sup> *Id.* at para. 185.

<sup>15</sup> The appointment of John Dasburg as the new Chairman and CEO of DHL Airways, Inc., effective April 1, 2003, will not alter Mr. Robinson’s role in any significant way. Mr. Dasburg will only acquire 5% of the common stock, presumably leaving Mr. Robinson with 70% of the voting stock of DHL Airways. Moreover, all of the other control factors outlined in the *IG Report* will remain in place and will not be altered by Mr. Dasburg’s employment.

<sup>16</sup> *See Motion of United Parcel Service Co.*, Docket OST-2001-8732, (Apr. 16, 2001) (attaching Commission Decision of 20 March 2001, Case Comp/35.141-Deutsche Post AG which required Deutsche Post to pay a 24 million euro fine); *Motion of United Parcel Service Co.*, Docket OST-2001-10052 (June 20, 2002) (attaching a European Union press release discussing EC Decision IP/02/890 and Deutsche Post’s illegal cross-subsidization and resulting 572 million euro fine).

market position.<sup>17</sup> When a company with the documented history of Deutsche Post becomes involved with a U.S. certificated air carrier, the DOT must be more than alert and vigilant.

### **III. This Case Should Be Referred To An Administrative Law Judge For Hearing.**

12. The findings of the Inspector General leave several matters open, such as Mr. Robinson's relationship with the foreign DHL entities, as well as the credit guarantee. As, seen in the best light for DHL Airways, there are material issues of disputed fact to be resolved, and UPS urges that a full oral evidentiary hearing before an ALJ is required.

13. The Inspector General found that the process used to date is not well-suited to this case because the case is complex, contentious and controversial. This alone should be sufficient grounds for the institution of an ALJ hearing.

14. Additionally, the authorities all agree that, where an unbiased review is needed and where complex facts are to be ascertained, a full evidentiary hearing before an ALJ is the preferred means of proceeding. In a seminal article in the Harvard Law Review in 1956, Professor Kenneth Davis stated, "The process of resolving disputed facts about particular parties is the essence of the judicial process and calls for a trial type of hearing."<sup>18</sup> Professor Davis further noted, "the conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in a determination of governmental action should ordinarily have an opportunity for a trial type of hearing on issues of adjudicative facts."<sup>19</sup>

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<sup>17</sup> See *id.* at 212.

<sup>18</sup> Kenneth C Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 202 (1956).

<sup>19</sup> *Id.* at 212.



15. In a 1997 article dealing with the history of ALJs, it was noted that, at the time of the passage of the Administrative Procedure Act, the U.S. Attorney General was concerned about both prosecutorial and adjudicative functions being combined in a single agency. The problem was solved by having hearing examiners “primarily responsible” for evidentiary fact-finding within an administrative agency.<sup>20</sup> The author further noted, “This procedural format ensures that the evidentiary facts will be found in the first instance by an official who is not subject to the agency's control.”<sup>21</sup>

16. These considerations are highly relevant in this case, where a letter from the DOT to DHL Airways in May 2002 indicated that DHL Airways was a U.S. citizen as determined in a private review.<sup>22</sup> The ownership and control-related facts presented in the *IG Report* would indicate a finding to the contrary. No rationale has ever been provided, and no public input has ever been permitted regarding this private review. As such, a fresh start to this important proceeding is required, and the best way to do that is by referring the matter to an ALJ.

WHEREFORE, United Parcel Service Co. respectfully requests the Department of Transportation to appoint an Administrative Law Judge to conduct an oral evidentiary hearing, followed by full Department review, to determine whether DHL Airways is under the actual control of a non-U.S. citizens.

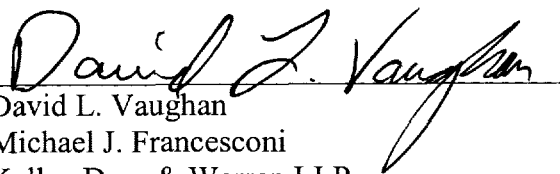
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<sup>20</sup> Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 Administrative L. Rev. 1, 7 (1997).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> See Letter from Donald H. Horn, Assistant General Counsel for International Law, to Stephen H. Lachter, Counsel to DHL Airways (May 1, 2002); see also Letter from Norman Y. Mineta, DOT Secretary, to The Honorable Don Young, Chairman, Committee on Transportation and Infrastructure, U.S. House of Representatives (May 1, 2002); Letter from Read Van de Water, Assistant Secretary for Aviation and International Affairs, to The Honorable John D. Rockefeller IV, U.S. Senate (May 7, 2002).

Respectfully submitted,

A handwritten signature in black ink, reading "David L. Vaughan". The signature is written in a cursive style with a horizontal line underneath it.

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Date: March 19, 2003

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of March 2003, a copy of the foregoing document was sent, via first-class mail, postage prepaid to the following:

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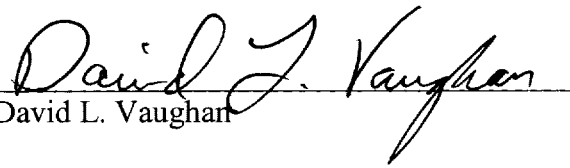
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